

In the Matter of)
)
Complaints Regarding Various Television)
Broadcasts Between February 2, 2002 and)
March 8, 2005)

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**COMMENTS OF THE
CENTER FOR DEMOCRACY & TECHNOLOGY**

Pursuant to the Public Notice issued September 7, 2006, DA No. 06-1739, the Center for Democracy & Technology (“CDT”) respectfully submits these comments in connection with the Court Remand of Section III.B of the Commission’s March 15, 2006 Order in *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 (“Omnibus Order”).

CDT is a non-profit public interest organization founded in 1994 to promote democratic values and individual liberties in the digital age, guided by our vision of the Internet as a uniquely open, global, decentralized, and user-controlled medium. We submit comments in this proceeding regarding broadcast television because of our belief that in this age of convergence, the technical nature of mass communications is dramatically shifting away from the historic broadcast model, and that shift must ultimately bring with it a shift away from the legal paradigm that has in the past governed government regulation of the broadcast medium.

In these comments, CDT advances two primary points. First, the Commission's consideration of – and decisions about – the “contemporary community standards” element of the indecency test¹ that the Commission applies is fundamentally and fatally flawed for a number of reasons. The Commission inappropriately relies on an artificially inflated count of “complaints” as a primary justification for adopting a stricter approach to indecency, and at the same time fails to undertake any meaningful assessment of actual community standards. By reacting to an inflated count of complaints, the Commission is facilitating a “heckler’s veto” in which a small – but very vocal – minority is allowed to overrule the broader community’s clear embrace of content which the minority finds offensive.

Second, the underlying justifications for allowing Commission regulation of broadcast communications are rapidly withering and are in the process of falling by the wayside. In its place, the courts (and ultimately the Commission) must turn to an analysis of “user empowerment” and “parental empowerment” tools that are far better at enabling parents to protect their children than any regulation or enforcement policy promulgated by the Commission. The historic reasons why the Supreme Court previously upheld the regulation of “indecency” by the Commission are becoming less and less valid, and thus the applicable First Amendment analysis must shift.

I. THE COMMISSION’S RELIANCE ON COMPLAINT COUNT IS INAPPROPRIATE, AND ITS FLAWED “CONTEMPORARY COMMUNITY STANDARD” ANALYSIS IS ARBITRARY AND CAPRICIOUS.

In the first paragraph of its Omnibus Order, the Commission identified its primary reason for adopting an aggressive and stricter approach to “indecency” in the broadcast medium:

¹ In light of the Supreme Court’s broad rejection of the indecency standard in *Reno v. ACLU*, 521 U.S. 844 (1997), CDT believes that the indecency test itself is open to serious attack. In these comments, however, we confine our discussion to the Commission’s flawed implementation of that test.

During the last few years . . . we have witnessed increasing public unease with the nature of broadcast material. In particular, Americans have become more concerned about the content of television programming, with the number of complaints annually received by the Commission rising from fewer than 50 in 2000 to approximately 1.4 million in 2004.²

As detailed below, the Commission's justification for its Omnibus Order based on a count of complaints is highly inappropriate, especially in light of the Commission's own conscious actions to grossly inflate the count of "indecentcy" complaints. And apparently because of the inflated count of complaints, the Commission wholly fails to engage in *any* substantive inquiry into and analysis of the "contemporary community standards." The Commission's inappropriate reliance on the complaint count and its complete failure to undertake a contemporary community standards analysis makes its decisions in this matter arbitrary and capricious under the Administrative Procedures Act.³

A. The Commission's Reliance on a Count of Complaints that the Commission Itself Inflated in Highly Inappropriate.

Both in its Omnibus Order and in a broad array of public statements over the past three years, the Commission has plainly indicated that its stricter enforcement of indecency rules is in response to an asserted rise in the number of indecency complaints received by the agency. In early 2004, then-FCC Chairman Michael Powell testified before Congress that his agency was taking steps "to sharpen our enforcement blade" in response to the "rise in the number of

² Omnibus Order ¶ 1.

³ An agency's action should be set aside where it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the products of expertise." *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89–90 (2d Cir. 2000) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The court's analysis is squarely applicable to the Commission's actions in this matter.

complaints at the Commission.”⁴ During a convention speech in April 2004, Powell stated that the “increase in the [FCC’s] enforcement efforts in this area is a *direct response* to the increase of public complaints” filed with the agency.⁵ And as noted, the Commission reaffirmed this fact in the first paragraph of the Omnibus Order, pointing to a dramatic rise in indecency complaints between 2000 and 2004.

This focus and reliance on an asserted rise in the number of complaints is highly inappropriate, for at least two reasons. First, between the cited years of 2000 and 2004, the Commission itself implemented two specific changes in the way that it counts indecency complaints (changes that were *not* made with other types of complaints to the FCC), in a manner that greatly inflates the number of complaints. In a paper published in 2005, Adam Thierer of the Progress & Freedom Foundation extensively described and documented the manipulations that the Commission undertook to inflate the number of complaints that the agency asserts have been received.⁶ That paper – attached as an Appendix hereto and incorporated by reference into these comments – lays out how at the behest of a single private advocacy group the Commission altered its procedures to multiply the count of complaints initiated by the advocacy group, so that each individual complaint is counted by the Commission many times over. The manipulation by

⁴ Testimony of FCC Chairman Michael Powell before the House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, February 11, 2004, at 2-3 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243802A3.pdf).

⁵ Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the National Association of Broadcasters Convention, April 20, 2004, Las Vegas Nevada, at 1 (emphasis added) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246876A1.pdf). Chairman Martin has made similar statements. See, e.g., Summary of Written Statement of Kevin J. Martin Before the Commerce, Science and Transportation, United States Senate, February 11, 2004 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243865A2.pdf).

⁶ Adam Thierer, “Examining the FCC’s Complaint-Driven Broadcast Indecency Enforcement Process,” PFF Progress on Point 12.22, November 2005 (attached as an Appendix hereto, and available at <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>).

the Commission of its complaint accounting, and then the subsequent justification of increased enforcement actions based on the inflated complaint counts, are both highly inappropriate.⁷

Second and more fundamentally, even if an increase in complaints actually happened and such complaints in fact bore any relationship to the views of the broader public (neither of which has been established here), the Commission cannot permit a narrow segment of society to impose a “heckler’s veto” over completely lawful speech that the narrow segment opposes. The Supreme Court has consistently stood against the idea of allowing a vocal minority (or even majority) to invoke the law and the power of the state to stifle or burden unpopular speech.⁸ In this case, the Commission is allowing a small minority to stifle speech that is in fact extremely *popular*, as discussed immediately below. By allowing a private advocacy group to “sharpen the [FCC’s] enforcement blade,” the Commission has subverted and ultimately corrupted its authority to enforce indecency standards.

B. The Commission Wholly Fails to Undertake *Any* Investigation Into or Analysis of “Contemporary Community Standards.”

In the first paragraph of its Omnibus Order, the Commission essentially asserts that the self-inflated number of complaints received by the agency is authoritative evidence that “Americans have become more concerned” about indecency.⁹ Apparently the Commission then concluded that this “evidence” allowed the Commission to forego *any* actual inquiry into or assessment of the “contemporary community standard.” Repeatedly throughout the Omnibus

⁷ To be clear, CDT fully supports the right of any advocacy group to seek to generate mass complaints and petitions to government advancing whatever views and in whatever form the group desires (including, as here, bulk e-mail campaigns). Such lobbying campaigns, however, cannot be taken by the agency (as the Commission has done here) as some indication of any broad public consensus on any issue.

⁸ See, e.g., *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Texas v. Johnson*, 491 U.S. 397 (1989); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

⁹ Omnibus Order ¶ 1.

Order, the Commission holds that certain content is “patently offensive under contemporary community standards” without *ever* attempting to determine what those standards in fact are.¹⁰

Repeatedly in state and federal courts around the country, courts face the question of what the “contemporary community standard” is under *Miller v. California*, 413 U.S. 15 (1973). In that context, community standards are most commonly determined through social science research that gathers data and assesses what types of content are *in fact* available in a given community. In stark contrast, the Commission makes no attempt at all to assess what content is in fact accepted and indeed often embraced in this country. Instead, the Commission makes its own wholly personal determination that the use of, for example, the word “bullshit” is “explicit and shocking and gratuitous.”¹¹

Even a brief (and unscientific) examination of content that already exists in the “community,” however, quickly draws into question the conclusions that the Commission reached about “contemporary community standards.” A search of the Internet Movie Database, for instance, found hundreds of examples of the term “bullshit” among “memorable movie quotes.”¹² Moreover, among these occurrences, the Motion Picture Association of America has given many of the movies featuring this particular expletive a PG or PG-13 rating.¹³ Setting aside the question of whether these ratings are suitable, the fact remains that words that the Commission finds indecent can be found in movies already marketed to and accessible by children in our communities (and widely available in the home over cable and satellite services,

¹⁰ See, e.g., Omnibus Order ¶¶ 102-106, 114-120, 127-131, 139-142

¹¹ Omnibus Order ¶ 131. At the same time, the Commission concludes that the word “dickhead” is perfectly acceptable, even though some people believe that the word “dickhead” is *more* inappropriate than “bullshit.”

¹² See The Internet Movie Database (IMDb), <http://www.imdb.com> (last accessed July 11, 2006).

¹³ For example, the IMDb reveals instances of the expletive in *The Abyss* (PG-13), *The Air Up There* (PG), *America’s Sweethearts* (PG-13), *Back to the Future II* (PG), *Cocoon* (PG-13), and *Goonies* (PG). The Internet Movie Database, <http://www.imdb.com/search> (last accessed July 11, 2006).

and through DVDs). Public demand for broadcasts and movies featuring unseemly language, as measured by ratings and box office ticket sales, demonstrate high community tolerance of and public support for material that the Commission would punish.

Indeed, as detailed in the Appendix, at 9-10, many of the television shows that are the primary targets of the mass complaint-generation efforts also happen to be some of the most popular shows in the country. Notwithstanding the personal preferences of the narrow advocacy groups that have generated complaints to the Commission, the content that is the target of the vast majority of complaints is clearly widely accepted across the country. Although popularity does not provide a license to violate the Commission's indecency test, the test itself looks to the "contemporary community standard" and popularity is a relevant indication of the broad acceptance of the challenged content in our society.

The Commission should not be injecting its own personal beliefs about what types of content should be available to children, but must instead be guided by the fact that content that the Commission finds offensive is *in fact* broadly accepted in a range of content (even some child-oriented content). The inappropriateness of the Commission's actions is even clearer when, as detailed in the following section, parents already have a range of effective tools with which they can make their own judgments about what their children can view.

II. AS THE VERY FOUNDATION OF THE COMMISSION'S AUTHORITY TO REGULATE BROADCAST TELEVISION CONTENT WITHERS, THE COMMISSION SHOULD NOT BE SEEKING TO DRAMATICALLY EXPAND THAT REGULATION.

The era of convergence is finally upon us, and the use of broadcast technology to distribute video entertainment is rapidly being replaced by a range of other vehicles, from traditional cable to ordinary Internet access to innovative new ways to deliver access to video content and the Internet. Closely tied to this shift in technology, the legal rationale for allowing

the Commission to regulate broadcast indecency is withering away. Video programming is no longer “pervasive” or “assaultive” as those terms were used to justify regulation, and viewer (and for minors, their parents) now have a broad range of technology that can “protect” the viewer from undesired content.

In his comments submitted to the Commission in this proceeding, Adam Thierer details the growing diversity of ways that parents and others have to control access to broadcast television.¹⁴ Starting with the V-chip and ranging to cable system controls and a number of creative protection and control devices, parents have a growing ability to control what video programming their children watch. And critically, the emergence of these technological solutions has a direct impact on the legal underpinnings of the Commission’s authority to regulate broadcast content. These user and parental “empowerment” tools present a less restrictive alternative to the censoring hand of government.

In a diversity of situations outside of the broadcast context, the Supreme Court has squarely endorsed the use of technology as a less restrictive means to further a governmental objective. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 877 (1997) (noting significance of “user based” alternatives to governmental regulation of speech on the Internet); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (for cable television). That the technical tools must be applied by parents does not diminish the legal significance of the tools as less restrictive alternatives. The Supreme Court in *Playboy* held that governmental efforts to promote voluntary efforts by parents to protect their children from sexual content are a less restrictive alternative to blocking mandated by statute. *See Playboy*, 529 U.S. at 827. In that case, the Court held that a statute that required cable companies to scramble sexually explicit

¹⁴ See Comments of Adam Thierer, Senior Fellow with The Progress & Freedom Foundation (“PFF”) and the Director of PFF’s Center For Digital Media Freedom (filed Sept. 21, 2006).

programming was unconstitutional in light of the less restrictive alternative of governmental promotion of voluntary blocking of the signal upon requests of parents. *Id.* at 822. As the Court observed, "targeted blocking [initiated by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners." *Id.* at 815. And the Court noted,

[I]t is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.

Id. at 824.

We do not suggest that the Commission *must* abandon the indecency test entirely at this time. But as convergence continues, user empowerment technology will only become more effective in giving parents the ability to protect their children, wholly without the counting of indecency complaints by the Commission. In light of this clear trend, we urge the Commission to be very cautious in embarking on a broad “sharpening” of its indecency rules. In the face of the increasing ability of parents to protect their kids, the government should be stepping back, not stepping forward to impose greater and greater regulation, chilling more and more completely legal and worthwhile speech.

CONCLUSION

The Commission should step away from the direction taken in its Omnibus Order. It should recognize that it failed to carry out an appropriate investigation into and analysis of contemporary community standards, and that in any event technology is rapidly progressing so as to make the Commission’s actions unnecessary.

Respectfully Submitted,

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APPENDIX

Adam Thierer, "Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process," PFF Progress on Point 12.22, November 2005

(available at <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>)

Examining the FCC's Complaint-Driven Broadcast Indecency Enforcement Process

By Adam Thierer

The Federal Communications Commission (FCC) regularly reports on the number of complaints it receives from the public on various matters under its jurisdiction, including broadcast indecency. These numbers are cited frequently as the driving force underlying federal efforts to crack down on unseemly broadcast content. Given the importance of these figures, this study will conduct a careful examination of the FCC's methodology in tracking indecency complaints.

This study reveals that the FCC now measures indecency complaints differently than all other types of complaints. In so doing, it permits a process whereby indecency complaints appear to be artificially inflated relative to other types of complaints. Journalists, policy makers, social scientists, and others should weigh this disparate treatment when considering the significance of the reported figures.

Even if the figures reported by the FCC were accurate, however, those tallies show that purported increases in complaints do not reflect heightened outrage among members of the public about what they see on TV or hear on the radio. Instead, the FCC's figures confirm that the vast majority of complaints are duplicate emails that are generated against a relative handful of programs disfavored by activist groups. Indeed, while the reported number of complaints between 2002 and 2004 grew by more than 100 times, the number of programs that were the subject of complaints *declined* by 20 percent over the same two-year period.

Recent reports of a significant decline in broadcast indecency complaints underscored the opaque nature of the FCC's statistical analysis. The most recent tally of complaints released on September 28, 2005 revealed that the number of complaints dropped from 157,016 in the first quarter of 2005 to 6,161 in the second quarter. The media reported the 96 percent drop in the number of complaints, and sought out expert opinion to explain the phenomenon.

A spokeswoman for the Parents Television Council (PTC), the leading pro-regulatory media activist group in America, was quick to note that the decline in the numbers could be explained by the PTC's lack of second quarter complaint crusades against specific programs. Melissa Caldwell, research director of the PTC, told *Dow*

Jones Newswire that PTC has orchestrated fewer complaint campaigns this year than it has in previous years.¹

The PTC's acknowledgment probably is the best explanation of the decrease, since FCC data shows that it has been far and away the primary generator of indecency correspondence in recent years. Of all complaints filed in 2003, 99.8 percent originated with the Parents Television Council, according to Freedom of Information Act (FOIA) requests filed with the FCC.² In 2004, the trend remained the same. Exempting the complaints associated with the Janet Jackson Super Bowl episode, 99.9 percent of all other FCC indecency complaints were generated by the PTC.³ One particular investigation involved a short-lived Fox Television reality show called "Married by America." In that case, the FCC originally said that 159 complaints were received about one specific episode. As a result, the agency fined Fox and its affiliates \$1.2 million for indecency violations. But after blogger and former *TV Guide* critic Jeff Jarvis sent a FOIA request to the FCC about the case, the agency's Enforcement Bureau was forced to reveal that there were actually only 90 total complaints from 23 unique individuals. The majority of these complaints were essentially the same PTC form letter.⁴

The PTC's increasingly effective use of computer-generated campaigns against specific TV programs is a leading factor in explaining the large jump in indecency complaints in recent years. But methodological changes not fully explained by the FCC also appear to have played an important role in creating artificially high, and thus unreliable, numbers.

The FCC and the Indecency Complaint Process

As the federal agency responsible for regulating broadcast programming, the FCC does not monitor what programs are on the air. Rather, it takes action to enforce its rules against broadcast "indecency" in response to complaints filed by the public. This is a delicate task for any government body whose governing law provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."⁵ So, in years

¹ Brian Blackstone, "Indecency Complaints Down Sharply In 2Q: FCC Says," *Dow Jones Newswire*, September 28, 2005, <http://news.nasdaq.com/aspxcontent/newsstory.aspx?&cpath=20050928%5CACQDJON200509281855DOWJONESDJONLINE001151.htm>

² Todd Shields, "Activists Dominate Content Complaints," *Media Week.com*, December 6, 2004, available at http://www.mediaweek.com/mediaweek/headlines/article_display.jsp?vnu_content_id=1000731656

³ Ibid.

⁴ Ibid. Also see Jake Tapper, "Is Popular Will Behind FCC Crackdowns," *ABC News.com*, December 4, 2004, <http://abcnews.go.com/WNT/story?id=299631&page=1>

⁵ 47 U.S.C. § 326.

past, the FCC has attempted to balance its conflicting duties by enforcing its rules “cautiously” and with “restraint.” Such reticence ended last year.

In 2004 the Commission embarked on a well-publicized campaign to strengthen its enforcement efforts. Ever since the infamous “wardrobe malfunction” during the 2004 Super Bowl halftime show, the official line has been that “the American public demands” more federal control over broadcast content. Just after the Super Bowl, former FCC Chairman Michael Powell testified before Congress that his agency was taking steps “to sharpen our enforcement blade” in response to the “rise in the number of complaints at the Commission.”⁶ During a convention speech, he later told the National Association of Broadcasters that the “increase in the [FCC’s] enforcement efforts in this area is a direct response to the increase of public complaints” filed with the agency.⁷ His fellow commissioners reinforced this message.⁸ These concerns about the rising number of complaints are also reflected in various legislative proposals that have been introduced to greatly expand FCC authority over broadcast programming.

Since 2002, the FCC has issued quarterly reports summarizing complaints submitted to the agency. But after the 2004 Super Bowl, as congressional pressure for FCC action mounted, the Commission compiled special counts that singled out indecency complaints. The first such report came in a post-oversight hearing letter from Chairman Powell to Congressman John Dingell. In response to specific questions, the FCC reported that the number of complaints increased from 111 in 2000 and 346 in 2001 to 13,922 in 2002 and 240,350 in 2003. As of March 2, 2004, the date of the Dingell letter, the number of complaints for that year totaled 530,885, mostly in response to the Super Bowl.⁹

While the FCC data appear to support the claim of a vast increase in complaints, a closer look suggests that the raw numbers are not a very good measure of broad public discontent with broadcasting generally. Embedded in the footnotes to a chart at the back of Chairman Powell’s letter, the FCC reported that over 97 percent of the 13,992 complaints filed in 2002 targeted “four specific programs,” and that in 2003, 99.8 percent of the 240,350 complaints were filed against “nine specific programs.”¹⁰ This data indicates that the significant increase in complaints reported in 2002 and 2003

⁶ Testimony of FCC Chairman Michael Powell before the House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet, February 11, 2004.

⁷ Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the National Association of Broadcasters Convention, April 20, 2004, Las Vegas Nevada, p. 1, 3, 13-14.

⁸ See *Super Bowl NAL*, 19 FCC Rcd. at 19231 n.6. See also *ibid.* (Statements of Chairman Michael K. Powell, Commissioner Michael J. Copps, Commissioner Kevin J. Martin, and Commissioner Jonathan S. Adelstein).

⁹ Letter from FCC Chairman Michael K. Powell to Hon. John D. Dingell, March 2, 2004, p. 8.

¹⁰ *Ibid.*, p. 8.

resulted not so much from a change in public attitudes toward broadcast programming but from a change in tactics by certain groups who waged email campaigns against the shows they dislike. Indeed, the FCC informed Congress that between November 2003 and February 2004, it had experienced “numerous high volume email events” that had “overloaded the FCC systems to the point where email to and from the Internet was disrupted and incoming mail from the Internet was not deliverable.”¹¹

To highlight such findings, the FCC maintains a special tally of indecency complaints on the Enforcement Bureau’s (EB) website.¹² It sets forth the number of complaints (and resulting enforcement actions) in the decade from 1994-2004. To be sure, it shows a massive increase in complaints between the years 2000 (when there were a total of 111 complaints) and 2004 (when there were over 1.4 million complaints). Table 1 reproduces the data shown in the current EB chart and previous reports.

Table 1: FCC Indecency Complaint Data (1994-2004)

Year	Complaints	Programs	Proposed Fines	Amount
2004	1,405,419	314	12	\$7,928,080
2003	166,683	375	3	\$440,000
2002	13,922	389	7	\$99,400
2001	346	152	7	\$91,000
2000	111	111	7	\$48,000
1999	5,853	N/A	3	\$49,000
1998	32,300	N/A	6	\$40,000
1997	828	N/A	7	\$35,500
1996	950	N/A	3	\$25,500
1995	947	N/A	1	\$4,000
1994	12,817	N/A	7	\$674,500

But are the sizeable jumps in recent years due to a sudden explosion in “indecent” content on the airwaves and a resulting outpouring of complaints by average Americans? Or was something else going on?

What Counts as “A Complaint”?

To answer that question, we need to step back and understand how the complaint process works and has been altered in recent years. Since the beginning of 2002, FCC indecency complaint data have been reported on a quarterly basis by the Consumer & Governmental Affairs Bureau (CGB) in its *Quarterly Report on Informal Consumer Inquiries and Complaints*.¹³ (The unadjusted totals from these reports are reproduced in the Appendix). Data from previous years are not publicly available on a

¹¹ *Ibid.*, p 3.

¹² Available at: www.fcc.gov/eb/oip/Stats.html

¹³ These reports can be found at: <http://www.fcc.gov/cgb/quarter/>

quarterly basis, but annual numbers are reported on a chart on the Enforcement via the EB website discussed above and other sources, including correspondence like the Powell letter to Congress.

Importantly, the numbers in the EB's table of annual indecency tallies have changed in recent months due to methodological changes and adjustments discussed below. But because of these changes and adjustments, the numbers on the EB's annualized chart shown above and the numbers contained in the CGB's *Quarterly Reports* do not match up prior to 2003. This is due to a change in what the Commission considers "a complaint."

What counts as "a complaint" might seem like a relatively simple matter, but it is not. Some letters to the agency might spell out in great detail why a particular listener or viewer thought a certain program was indecent while others might contain little more than a few incoherent words strung together complaining about a particular show. And, increasingly, many others are simply computer-generated form letters that required the complainant to do little more than punch their name into an online website petition.

Change #1: Computer-Generated Form Letters Counted as Individual Complaints: It is this last category of complaints that have created special problems for the FCC in recent years given the increasing use of computer-generated complaint campaigns by groups such as the Parents Television Council. If the PTC or other activist groups generate the bulk of most of the complaints about a specific program, and all those complaints are the exact same form letter sent from their websites, should it be counted as a single complaint or multiple complaints?

Prior to the summer of 2003, the Commission aggregated together all such identically worded form letters or computer-generated electronic complaints and counted them as a single complaint. But at some point during the summer of 2003, the FCC quietly changed its methodology to count group complaints as individual complaints. Although the agency did not release any public notices or press releases to explain its methodological switch, the change can be verified by examining FCC data and statements by the Parents Television Council from that time.

In a July 1, 2003 press release entitled "FCC Reacting to PTC Demands," the PTC noted that it had "demanded... five specific steps that the FCC must take to ensure the decency standards are enforced" and called on the agency to take those steps by June 30, 2003.¹⁴ The fourth of the five PTC demands to the FCC stated:

"The Commission needs to direct the Enforcement Bureau to count multiple complaints about a single broadcast as multiple complaints."¹⁵ The press release goes on to note that, "Since imposing the deadline of June 30th on the Federal Communications Commission, the PTC has engaged in discussions with several

¹⁴ "FCC Reacting to PTC Demands," Parents Television Council, *Press Release*, July 1, 2003, <http://www.parentstv.org/ptc/publications/release/2003/0701.asp>

¹⁵ *Ibid.*

FCC Commissioners and/or their staffers concerning the review and enforcement of commonsense decency standards for television broadcasters in America. *The PTC has been told to expect results on these fronts before the end of July.*¹⁶

The press release also includes the following quote from PTC President Brent Bozell: "The PTC has received indications from several Commissioners that the FCC is serious about resolving this issue to our mutual satisfaction. Given the environment of productive talk and fruitful dialogue, the coalition has agreed to work with FCC officials through the month of July to resolve this issue."¹⁷

An examination of the FCC's indecency complaint tallies from the second and third quarters of 2003 reveals the result of this change. The reason PTC likely picked the June 30, 2003 date as the cut-off for its "demands" was because that is the last day of the FCC's data collection period for the second quarter complaints. As Table 2 shows, up until June 2003, indecency complaint tallies rarely broke double-digit totals on a monthly basis. But starting with the third quarter report that year, coinciding precisely with PTC's "deadline" and "indications" it received from several FCC commissioners that the advocacy group would be satisfied with the result, the numbers skyrocketed into quadruple figures and then suddenly into the tens of thousands.

Table 2: Unadjusted Indecency Complaints for 2003 (As Reported In Various FCC Quarterly Reports on Informal Consumer Inquiries and Complaints)

	Number of Complaints	Complaints by Quarter	Complaints by Year
Jan-03	46		
Feb-03	45		
Mar-03	53	144	
Apr-03	47		
May-03	62		
Jun-03	242	351	
Jul-03	5,552		
Aug-03	8,876		
Sep-03	5,492	19,920	
Oct-03	28,206		
Nov-03	41,075		
Dec-03	76,987	146,268	166,683

As further verification of this methodological change, the latest revision of the EB's annualized indecency complaint chart now includes the following footnote: "The number of complaints received may vary significantly from month to month depending on

¹⁶ *Ibid.* [emphasis added]

¹⁷ *Ibid.*

whether there have been mass e-mail or letter campaigns about particular programs.”¹⁸ Thus, it is clear that this change has likely greatly inflated the number of indecency complaints the FCC reports on a monthly and annual basis.

Change #2: Complaints to Multiple Offices Counted Multiple Times: But the move in the summer of 2003 to count form letters individually wasn't the only important statistical change the agency made recently with regard to indecency data. In early 2004, the agency again quietly changed its method of counting indecency complaints. The FCC's *Quarterly Report on Informal Consumer Inquiries and Complaints* for the first quarter of 2004 reported a significant jump in indecency complaints in January and February following the Janet Jackson Super Bowl incident. In a sense, therefore, the jump in indecency complaints was not surprising. On the other hand, buried in the fine print of the footnotes on page 9 of that FCC *Quarterly Report* was the following note regarding indecency tallies:

“Commencing with this report, the reported counts reflect complaints received directly by CGB, complaints forwarded to EB, complaints received separately by EB, and complaints emailed directly to the FCC's Commissioner's offices and FCCINFO. The reported counts may also include duplicate complaints or contacts that subsequently are determined insufficient to constitute actionable complaints.”¹⁹

This means that since the first quarter of 2004, the FCC has been counting *identical* indecency complaints multiple times according to how many Commissioner's offices and other divisions receive the complaints. Consequently, some indecency complaints might be inflated by a factor of 6 or 7 because the agency could be counting the same complaint multiple times if it was sent to each of the five Commissioner's offices and the other offices listed above. In an age of computer-generated petitions, bombarding multiple FCC offices with complaints is as literally as simple as the click of a button.

Are all indecency complaints counted in this fashion? Not necessarily, since some complaints might not be sent to multiple offices. Thus, we just don't know how many times any individual complaint is being counted as multiple complaints by the FCC. Some complaints may be counted 5 or more times while others are just counted once. As a result, it is impossible to determine exactly how much indecency “complaint inflation” is taking place today at the FCC, but there seems to be little doubt that it *is* taking place.

The FCC's quiet statistical changes are troubling for three reasons. First, the FCC failed to provide the public official notice of these changes outside of some limited

¹⁸ See Footnote 2: <http://www.fcc.gov/eb/oip/ComplStatChart.pdf>

¹⁹ Federal Communications Commission, *Quarterly Report on Informal Consumer Inquiries and Complaints*, First Quarter 2004, February 11, 2004, <http://www.fcc.gov/cgb/quarter/2004qtr1.pdf>

and quite confusing fine print in the footnotes of quarterly reports. The EB and CGB websites do not include any press releases or summaries of these changes. And there does not appear to be any mention of these changes in any speeches by FCC Commissioners or bureau chiefs.

Second, apparently the FCC only made these methodological changes for indecency complaints, not for any other category of complaints that the agency receives. In other words, a complaint sent to the FCC regarding poor broadcast signal quality, or about some other “program quality” aspect of television or radio programming, is classified as a “general criticism” or “other programming issue” complaint *and only counted once*. The same goes for complaints about cable rates, phone service or anything else. In other words, the standard for all other issues is: “one complaint, one vote.” But when it comes to the issue of indecency, the new standard is: “one complaint, (potentially) multiple votes.” This represents a significant change in how the agency conducts its business and yet, again, it has garnered little more than a few footnotes in FCC quarterly reports or charts. Very few people likely read such footnote fine print in close enough detail to realize how the statistical methodology has changed.

Third, policymakers have relied on the FCC statistics documenting an apparent increase in indecency complaints without acknowledging that much of the change may be explained by the hidden changes in methodology. Moreover, these changes coincided with the efforts of one advocacy group—the Parents Television Council—to change the indecency complaint process and to promote the “increase” in complaints as a mandate to tighten the indecency standard itself. For many years, the PTC has pressured the FCC to change their methodology to give greater weight to their computer-generated e-mail complaint campaigns. It appears their efforts paid off and now the PTC and other groups are essentially able to “stuff the ballot box” in terms of inflating indecency complaints at the FCC and potentially spurring increased regulatory activism as a result.

Reflections on the Complaint Process

It wasn’t always the case that indecency data drew such scrutiny. In fact, before 2000, the FCC didn’t even compile quarterly data on indecency complaints. The fact that indecency complaints are subjected to such tabulation today is a sign of just how politicized the entire process has become. In the past, the filing of a complaint meant very little; it was only when action was taken on that complaint that true news was made. Today, by contrast, the numbers *are* the news.

The influence of single-interest advocacy groups on the complaint process also deserves greater scrutiny. As mentioned above, only a small handful of shows generate the majority of complaints. This is likely a function of the PTC’s targeted complaint crusades against specific programs. But should the PTC’s tastes and desires dictate which shows appear on television? The danger here is that policymakers are granting a small, but vocal, group of regulatory proponents a “heckler’s veto” over all content determinations. Their views and values end up trumping what the public at large actually demands. To be sure, PTC has every right to pepper the FCC with its

complaints. Indeed, PTC's successes speak to the power of its political methods and influence. The irony, of course, is that PTC's muscular use of its First Amendment right to petition the government is in the service of squelching others' speech rights.

More importantly, program ratings data, awards, and critical praise make it clear that the PTC's values or desires are not congruent with those of the general viewing public. Table 3 lists several television programs which frequently appear on PTC's ongoing list of "Worst Television Shows." Presumably, these are programs that the PTC would like the FCC to censor. The table also provides recent Nielsen ratings and notable awards for each program. Clearly, these programs are among the most popular and critically praised on television today. The millions of Americans who watch these programs never bother sending letters to the FCC telling regulators how much they enjoy these shows; they just turn off the TV and go to bed. If the PTC had their way, however, they would all likely be censored or taken off the air entirely even though PTC's voice represents only a small fraction of the overall viewing audience.

Table 3: Who Decides? The PTC or the Public?

Programs Frequently Appearing on the PTC's "Worst TV Shows" Lists	Nielsen Rating (2004-2005)	Nielsen Rating (2003-2004)	Nielsen Rating (2002-2003)	Notable Awards
C.S.I. (Crime Scene Investigation)	#3 23.0 million	#2 25.6 million	#1 26.2 million	Winner, People's Choice Award "Favorite Television Dramatic Series" (2003, 2004, 2005); Nominee, Emmy Awards "Outstanding Drama Series" (2002, 2003, 2004); Nominee, Golden Globes "Best Television (Drama) Series" (2001, 2002, 2004)
Desperate Housewives	#4 19 million	NA	NA	Winner, Golden Globes "Best Television (Comedy) Series" (2005); Winner, People's Choice Award "Favorite New Television Drama" (2005); Nominee, Emmy Award "Outstanding Comedy Series" (2005)
C.S.I. Miami	#6 19 million	#9 18.1 million	#15 16.6 million	Winner, People's Choice Award "Favorite New Dramatic Series" (2003)
Friends	NA	#5 21.4 million	#4 21.8 million	Winner, Emmy Awards "Outstanding Comedy Series" (2002); Nominee, Emmy Awards "Outstanding Comedy Series" (1995, 1996, 1999, 2000, 2003);
Two and Half Men	#13 15 million	#16 15.3 million	NA	Winner, People's Choice Award, "Favorite New Comedy Series" (2004)
Will & Grace	NA	#15 15.6 million	#12 16.8 million	Winner, Emmy Award "Outstanding Comedy Series" (2000); Nominee, Emmy Award "Outstanding Comedy Series" (2001, 2002, 2003, 2004); Winner, People's Choice Award, "Favorite Comedy Series" (2000, 2001, 2002, 2003, 2004)
Cold Case	#18 14 million	#17 14.4 million	NA	None
NYPD Blue	NA	#50 9.9 million	#36 11.6 million	Winner, Golden Globes "Best Television (Drama) Series" (1994); Nominee, Golden Globes "Best Television (Drama) Series" (1995, 1996, 1997, 1998); Winner, Emmy Award, "Outstanding Drama Series" (1995, 1996); Nominee, Emmy Award, "Outstanding Drama Series" (1994, 1997, 1998, 1999);
That's 70's Show	NA	#48 10 million	#50 10.4 million	Winner, TV Guide Awards "Favorite New Series" (1999)
Everwood	NA	#125 4.5 million	#123 4.8 million	Winner, Television Critics Association "Outstanding New Program of the Year" (2003)

Conclusion

The one thing that all “hard” and “soft” sciences share is a common need for reliable, consistent data if a scientist is to do their job properly. Without good data, scientific analysis becomes a guessing game based on competing theories. That explains why social scientists of all stripes demand good data from government agencies. Economists, for example, obsess over government productivity and inflation data, which is central to the study of many issues in the fields of macro- and microeconomics.

Of course, government data isn’t always as accurate or reliable as it could be, and that is certainly true of government productivity and inflation numbers. But at least there isn’t something mysterious about the way those numbers are being gathered or computed. In the case of indecency complaints at the FCC, however, the numbers are highly suspect. It is becoming increasingly apparent that this statistic-gathering process has become highly politicized and, as a result, fails to serve as an accurate gauge for public policy analysis or decision-making in this area. As a result, journalists, policy makers, social scientists, and others should not place much stock in these numbers or use them as the basis of any firm conclusions one way or the other.

Appendix:
Unadjusted Indecency Complaints (2002-Summer 2005)
 (Source: Federal Communications Commission,
Quarterly Report on Informal Consumer Inquiries and Complaints)

	Number of Complaints	Complaints by Quarter	Complaints by Year
Jan-02	45		
Feb-02	36		
Mar-02	161	242	
Apr-02	46		
May-02	47		
Jun-02	48	141	
Jul-02	35		
Aug-02	30		
Sep-02	28	93	
Oct-02	39		
Nov-02	41		
Dec-02	17	97	573
Jan-03	46		
Feb-03	45		
Mar-03	53	144	
Apr-03	47		
May-03	62		
Jun-03	242	351	
Jul-03	5,552		
Aug-03	8,876		
Sep-03	5,492	19,920	
Oct-03	28,206		
Nov-03	41,075		
Dec-03	76,987	146,268	166,683
Jan-04	119,271		
Feb-04	543,255		
Mar-04	30,554	693,080	
Apr-04	270,287		
May-04	1,696		
Jun-04	835	272,818	
Jul-04	949		
Aug-04	922		
Sep-04	119,817	121,688	
Oct-04	119,785		
Nov-04	190,805		
Dec-04	7,243	317,833	1,405,419
Jan-05	138,652		
Feb-05	14,480		
Mar-05	3,884	157,016	
Apr-05	2,101		
May-05	2,053		
Jun-05	2,007	6,161	

**Change #1
Takes Effect**

**Change #2
Takes Effect**